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Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine

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NOTE

PRIVATE PROPERTY RIGHTS YIELD TO THE ENVIRONMENTAL CRISIS: PERSPECTIVES ON THE PUBLIC TRUST DOCTRINE

In response to the environmental crisis of the latter half of the twentieth century, courts and commentators seeking a theory broadly applicable to environmental litigation have dusted off the ancient public trust doctrine from its origins in Roman law and British common law.[1] Traditionally, the doctrine was used to establish public rights to navigable waters such as oceans and rivers and as a basis for states to assert their public trust ownership of tidelands.[2] As a result of the increasing urgency of the environmental movement and the magnitude of environmental despoliation in recent years, courts and legislatures have expanded the scope of the doctrine.

Recent decisions reflect a growing willingness to use the trust doctrine as a means of preventing the development and private exploitation of natural resources placed in the legal category of the public trust. Tensions between private property ownership and public environmental and natural resource rights are apparent in modern case law as private property owners, the public, and the sovereign compete for scarce resources and litigate over threats to the environment. Public trust litigation evidences this clash between public and private property rights as the courts attempt to carve judicial solutions to environmental problems.

1. F. GRAD, ENVIRONMENTAL LAW 1005 (3d ed. 1985); *see* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

2. F. GRAD, *supra* note 1, at 1006.

I. OVERVIEW OF THE PUBLIC TRUST DOCTRINE

A. Genesis in Roman Law

The public trust concept includes state ownership of property held exclusively for the benefit of and use by the general public. In its oldest form, the doctrine generally prohibits the state from alienating these lands into private hands. This concept has its roots in ancient Roman laws governing seas, seashores, and rivers. In Roman law, a classification scheme developed which grouped types of public and private properties.[3]

Res extra commercium included three types of property that were prevented from being the object of private rights.[4] These three classes of property were *res divini juris*,[5] *res publicae*,[6] and *res ominium communes*.[7] *Res ominium communes* included property similar to that within the scope of the modern public trust: the air, the waters of natural streams, the sea, and the bed of the sea.[8] The concept of a public trust was reflected in the scholarly thought of the day. Cicero, for example, believed that the seashore was not owned by any individual and could be used by everyone.[9]

In Justinian's law, a similar classification scheme prevailed. The term *res publicae* denoted property that was held for common use and, in principle, could never be the object of exclusive individual rights.[10] According to Justinian, this category of property was classified as *res extra commercium* and was not within the domain of private law.[11]

In his *Institutes*, Justinian expounds the law of the use of property belonging to the public.[12] These laws are remarkably similar to the modern conception of the public trust in American law as it pertains to oceans and rivers.[13] He believed that the "air, running water, the sea,

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3. *See* R. SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 302-09 (J. Ledlie trans. 3d ed. 1970).

4. *Id.* at 302.

5. *Res divini juris* were divided into three subcategories including (1) *res sacrae* dedicated to the gods; (2) *res sanctae*, which enjoyed the protection of the gods; and (3) *res religiosae* dedicated to burial grounds. *Id.* at 302-03.

6. The term *res publicae* denoted public property. It embraced everything owned by the Roman people and "outside of the pale of private law." *Id.* at 303.

7. *Id.*

8. *Id.*

9. A. WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC 13 (1984).

10. *See* R. SOHM, *supra* note 3, at 303.

11. *Id.*

12. T. COOPER, THE INSTITUTES OF JUSTINIAN 67-70 (1812).

13. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1 (1894).

and consequently the shores of the sea"[14] were "[t]hings common to mankind by the law of nature."[15] Rivers and ports belonged to the public; the public enjoyed the concomitant rights of fishing and navigation.[16] The use of riverbanks was "[b]y the law of nations . . . as public as the rivers."[17] Public rights to the riverbanks included the liberty to "land . . . vessels, unload them, and to fasten ropes to trees upon the banks, as to navigate upon the river itself . . . ."[18]

Initially a lack of clarity existed as to whether these public waters were owned by no one, by the people, or by the State; the latter emerged as the winner:

> [I]n general, the shore was not owned by individuals. One text suggests that it was the property of the Roman People. More often it is regarded as owned by no one, the public having undefined rights of use and enjoyment. . . . Whether the river-bed belonged to the Roman People, or to the riparian owners, or to no one was never clearly defined. There was, no doubt, a tendency, which became more pronounced as time went on, to regard all res publicae as the property of the Roman People, or, as we should say, of the State . . . .[19]

One distinction between the ancient Roman trust doctrine and the modern American public trust is that Roman law did not provide a legal remedy for the assertion of public rights against the state for its failure to protect the public interest.[20]

B. Development in British Law

Under the British crown, title to public lands was held in trust by the King for the benefit of the nation. Titles to lands under English waters, such as navigable waters and tidelands, were vested in the King.[21] The King could grant the land to private owners, but the grants were subject to the public's paramount right to the use of the waters—a right the King could neither abridge nor destroy.[22] If the grant interfered with the implied reservation of the public right or harmed the public interest, the grant was rendered void.[23] Parliament,

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14. T. COOPER, *supra* note 12, at 67.
15. *Id.*
16. *Id.* at 68.
17. *Id.*
18. *Id.*
19. R. LEE, THE ELEMENTS OF ROMAN LAW 106-07 (1944) (footnotes omitted).
20. *See* Sax, *supra* note 1, at 475.
21. *See* People v. New York & Staten Island Ferry Co., 68 N.Y. 71, 76 (1877).
22. *Id.*
23. *Id.* "The *jus privatum* that is acquired by the subject, either by patent or by prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of

however, could exercise its police power to enlarge or restrict public rights in order to advance a "legitimate public purpose."[24]

At earliest British common law, courts recognized sound public policy principles that formed the foundations of the public trust doctrine. The common right to use of the sea and navigable rivers was viewed as essential to commerce, trade, and navigation. The private appropriation of this use potentially could cripple or destroy commerce and navigation.[25] Fishing rights also were protected for the benefit of the public as a whole.[26] State regulation of the public use of navigable waters was permitted only in the public interest and as was " 'deemed consistent with the preservation of a public right.' "[27]

C. The Public Trust in American Law: the Watershed Case

Roman and British history is reflected in American common law which fosters the special protection of public uses of certain lands and waters.[28] While the doctrine was cited in early American cases, its sharp teeth were felt acutely and were of dispositive impact in *Illinois Central Railroad v. Illinois*.[29] In *Illinois Central*, the railroad company asserted its title to submerged beds of Lake Michigan by virtue of an 1869 fee simple grant from the Illinois legislature. The grant included a one mile stretch of shoreline along the city of Chicago. The area of the grant extended one mile from the shore into the lake and encompassed a total area of over one thousand acres.[30] In 1883, the Attorney General brought suit asserting the state of Michigan's title to the bed of the lake and certain areas of the shore which were lined with the railroad's tracks, piers, and warehouses.[31]

The Court analyzed the development and implications of the public trust doctrine, then applied it to invalidate the legislature's grant. The Court stated that the navigable waters of the harbor and the lands

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the sea are affected by the public use." *Id.*

24. *See* Sax, *supra* note 1, at 476; *see also* Martin v. Waddell's Leasee, 41 U.S. (16 Pet.) 367, 412-13 (1842) (Court expressed opinion that the Magna Charta divested King of power to grant to subjects the soil under navigable waters).

25. *New York & Staten Island Ferry Co.*, 68 N.Y. at 77.

26. Sax, *supra* note 1, at 475. *But see* Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 336-37 (1918) (arguing that the King, who could benefit navigation and commerce without owning the soil beneath the waters, intended to benefit only himself by gaining revenues from their use).

27. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 458 (1892) (quoting *New York & Staten Island Ferry Co.*, 68 N.Y. at 77).

28. *See* Sax, *supra* note 1, at 476.

29. 146 U.S. 387 (1892).

30. *Id.* at 454.

31. *Id.* at 433.

under them were held in trust for the public.[32] The state's control for purposes of this trust could never be alienated or lost, except in the case of parcels of trust land used in promoting the public interest or disposed of without impairing the public's interest in the remaining lands and waters. The Court was especially impressed with the vast area of the grant and its vital commercial importance to the city of Chicago. The Court stated that the area was as "large as that embraced by all the merchandise docks along the Thames at London; . . . twice that of the port of Marsailles, and nearly, if not quite, equal to the pier area along the water front of the city of New York."[33]

The Court held that the legislative act of April 1869 was inoperative to affect the sovereignty, dominion, and ownership of the state over the lands.[34] Since the legislature, as grantor, conveyed the property in disregard of the public trust by which it was bound to hold and manage it, the contract was repealable and the grant was void. Just as divesting the state of control of the harbor and transferring control to a foreign nation or a corporation of another state would be "a gross perversion of the trust over the property under which it is held,"[35] the Court found it inconceivable that the state would vest title to the harbor in a private corporation.[36]

Principles articulated by the *Illinois Central* Court have become essential to modern public trust litigation. Professor Sax, the pre-eminent authority on the public trust doctrine, summarizes the decision's impact in terms of state management of public resources such as rivers, seashores, and national parks. A state's holding of resources available for the general public will cause a court to "look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restrictive uses *or* to subject public use to the self-interest of private parties."[37] The implications of the decision provided a springboard for the emergence of the doctrine as a viable cause of action in contemporary environmental law.

D. Phillips Petroleum Co. v. Mississippi: *Invigorating the Sovereign's Public Trust Interest in Nonnavigable Tidelands*

In an arguably "radical expansion of the historical limits of the public trust,"[38] the Supreme Court held in *Phillips Petroleum Co. v.*

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32. *Id.* at 459.
33. *Id.* at 454.
34. *Id.* at 460.
35. *Id.* at 455.
36. *Id.* at 454-55.
37. Sax, *supra* note 1, at 490 (emphasis in original).
38. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 493 (1988) (O'Connor J.,

Mississippi[39] that the public trust in the state of Mississippi includes title to all lands under waters influenced by the ebb and flow of the tide.[40] The dispute arose when the state granted oil and gas leases to land underlying the Bayou LaCroix and eleven small drainage streams in southwestern Mississippi. Record title to this land was held by Phillips Petroleum. The titles were traceable to prestatehood Spanish land grants. Phillips and its predecessors-in-interest paid taxes on the land for over one hundred years. Despite Phillips' record title, Mississippi based its assertion of title on its claim that it owned all tidelands in the state and held them in public trust.[41]

The Supreme Court clarified and expanded the public trust interest in tidelands. First, the court rejected Phillips' contention[42] that "navigability—and not tidal influence—has become the *sine qua non* of the public trust interest in tidelands in this country."[43] The Court viewed its earlier decisions as recognizing the doctrine's scope to include all lands beneath waters influenced by the ebb and flow of the tide, regardless of the navigability of the waters.[44] The court held that upon entry into the Union, the states, by virtue of the equal footing doctrine,[45] were given ownership of all lands under tidal waters.[46] Since the lands at issue were tidally influenced, the title to them passed to the state of Mississippi upon its entry into the Union.[47]

The majority rejected the petitioners' argument that the decision would upset their reasonable, settled property expectations based on their holding record title to the disputed lands and on the fact that they paid taxes on the land for more than a century.[48] The court reasoned that settled case law in Mississippi made clear the state's general public trust interest in tidelands, even though the issue of its claim to nonnavigable tidelands was of first impression.[49] The majority cited the "long established"[50] rule that "[s]tates have the authority to define

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dissenting).

39. 484 U.S. 469 (1988).

40. *Id.* at 484.

41. *Id.* at 472.

42. *Id.* at 478-80.

43. *Id.* at 478.

44. *Id.* at 479-80.

45. Upon entry into the Union, the original thirteen states were given all lands under tidal waters. The equal footing doctrine provides that the rest of the states similarly succeeded to the King's rights with respect to waters within their borders. *See id.* at 486 (O'Connor, J., dissenting).

46. *Id.* at 481-84.

47. *Id.* at 476.

48. *Id.* at 481-84.

49. *Id.* at 482.

50. *Id.* at 475.

the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[51] The Court reasoned that the decision will not upset titles in coastal states which have, as a matter of state law, granted public trust tidelands to private property owners.[52] Further, many land title disputes have been resolved by the ebb-and-flow rule for tidelands—a holding that navigability was the determinative factor in state public trust interest would upset far more titles and settled expectations of property owners.[53] Finally, public fishing, hunting, and bathing rights retained in states where tidelands have been granted to private owners would be jeopardized if public trust rights in nonnavigable tidal waters were lost.[54]

Justice O'Connor, joined by Justice Stevens and Justice Scalia, strongly dissented. Alarmed that the majority's decision "will disrupt the settled expectations of landowners not only in Mississippi but in every coastal State,"[55] the Justices dissented from "this undoing of settled history."[56] According to the dissent, the danger in the majority rule was the degree to which it expanded traditional public trust rights in tidelands. Before the decision, this public interest extended primarily to waters that were a part of or immediately bordered navigable waters, including navigable waterway borders, bays, and inlets.

The legal effect of the decision is to extend the state's public trust interest to tidal, nonnavigable waters which include discrete bodies of water remote from and indirectly interconnected to the ocean or navigable tidal waters.[57] The dissenting Justices argued that the effect of including such waters, for example, the Louisiana streams and bayous at issue in the case, could be prevented by making navigability, not tidal influence, the standard of public trust interest.[58]

The dissent further argued that the majority's holding had dramatic, far-reaching, and undesirable pragmatic impacts. The court noted that the traditional public trust uses include the facilitation of commerce and the promotion of the public's interest in fishing.[59] In contrast, the state of Mississippi advocated this expansion of the public trust in order to issue exploitative oil, gas, and mineral leases to private parties.[60] Furthermore, thousands of innocent record title and

51. *Id.*
52. *Id.* at 482.
53. *Id.* at 483.
54. *Id.* at 483-84.
55. *Id.* at 485.
56. *Id.*
57. *Id.* at 490.
58. *Id.*
59. *Id.* at 492-93.
60. *Id.*

leaseholders of land could be displaced by the Court's decision.[61] According to the dissent, nine million acres of land have been classified as fresh or saline wetlands; the majority's rule will increase challenges to these titles.[62] Commentators have noted that, in effect, the decision will "fortify the operation of the trust as a state tool for economic and environmental control of significant resources [and give strength to] legislatures and activists who choose to assert the public interest more forcefully in an age of ever-increasing property conflicts."[63]

E. The Public Trust Doctrine in South Carolina Law

In *Phillips Petroleum* the United States Supreme Court cited *State v. Pinckney*[64] as case authority for the proposition that a state can have dominion over salt marshes beneath nonnavigable tidal waters. *Pinckney* is the seminal South Carolina public trust doctrine case. In *Pinckney* the court applied the doctrine to establish public ownership of marshes.[65] The dispute in *Pinckney* arose when the state, asserting its ownership of the marshes, filed suit against the defendants for digging, mining, and removing phosphate ore from salt marshlands surrounding Morgan Island.[66] The court found the common law rule to be that the boundary of land bordered by a tidal navigable stream extended only to the high water mark.[67] If the land is bounded by the sea or an arm of the sea, the space between the high and low water mark is the shore, and belongs by common law to the sovereign. The sovereign holds this land in trust for the public, thus precluding the claim of any person who has not acquired title by grant from the sovereign.[68]

While discussing the public trust in terms of land bordered by the sea and tidal navigable streams, the court nevertheless went on to apply the doctrine to vast areas of salt marsh located far inland. Concluding that title to the marshland between low water and ordinary high water had never been conveyed by the state, the court held that the state was entitled to recover its ownership of the disputed salt marshes.[69] The *Phillips Petroleum* Court used *Pinckney* as authority sup-

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61. *Id.* at 493.
62. *Id.* at 494.
63. *See* Note, Phillips Petroleum Co. v. Mississippi *and the Public Trust Doctrine; Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U.L. REV. 571, 597-98 (1989).
64. 22 S.C. 484, 507-09 (1885).
65. *Id.* at 509.
66. *Id.* at 495.
67. *Id.* at 507.
68. *Id.*
69. *Id.* at 510.

porting Mississippi's claim of ownership of all the tidelands in the state.[70] The Court also used *Pinckney* and similar cases to extend the public trust to include land beneath nonnavigable tidal waters.[71]

As in *Pinckney*, later cases involving disputed titles to marshlands have recognized that these lands are held by the state in trust for the public. For example, in *State v. Fain*[72] the state asserted its title to tidelands adjacent to a tidal navigable stream. The state prevailed against the claim of private ownership since the grants lacked language evidencing an intent to convey the tidelands below the high water mark. The South Carolina Supreme Court held that title to the portion between the high and low water mark remained in the state for the public's benefit.[73]

Similarly, in *Hobonny Club, Inc. v. McEachern*,[74] the court noted that tidelands "enjoy a special or unique status, being held by the State in trust for public purposes."[75] The *Hobonny* court aligned this rule with the historic common law of England which permitted the King to grant tidelands to subjects who could exercise private ownership of the tidelands.[76] The court held that since the eighteenth century grants in dispute had specific plat references evidencing an intent to convey land below the high water mark, the grants were sufficient to convey title to the public trust tidelands to a private corporation.[77]

The South Carolina Supreme Court significantly expanded the public trust interest in tidelands in *State v. South Carolina Coastal Council*.[78] This case represents the modern trend, since unlike the majority of earlier South Carolina public trust cases, *Coastal* did not involve a title dispute. Instead, the dispute arose over a permit issued by the South Carolina Coastal Council involving 660 acres of marshland at Annandale Plantation in the Santee River Delta area of Georgetown County.[79]

The terms of the permit authorized the respondent, a private citizen, to construct embankments which would enclose 660 acres and re-

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70. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 474-75 n.3 (1988).

71. *Id.*; *see also* Wright v. Seymour, 69 Cal. 122, 123-27, 10 P. 323, 324-26 (1886) (California owned bottom of Russian River which was tidal but not navigable in fact); Simons v. French, 25 Conn. 346, 352-53 (1856) (tidal flats adjoining arm of sea are within public ownership).

72. 273 S.C. 748, 259 S.E.2d 606 (1979).

73. *Id.* at 752, 259 S.E.2d at 608.

74. 272 S.C. 392, 252 S.E.2d 133 (1979).

75. *Id.* at 396, 252 S.E.2d at 135.

76. *Id.*; 252 S.E.2d at 136 (citing Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968)).

77. *Id.*

78. 289 S.C. 445, 346 S.E.2d 716 (1986).

79. *Id.* at 446, 346 S.E.2d at 717.

sult in the loss of 50 acres of marsh as well as the removal of the 660 acres from the unimpounded Santee Estuarine System. The permit was granted subject to two conditions: (1) that state and federal agencies be allowed to conduct mariculture experiments within the confines of the created impoundment; and (2) that the status of the title to the land remain unaffected.[80] The appellants contended that the permit "unlawfully allow[ed] the blockage of navigable streams"[81] and was in violation of Coastal Council regulations because it exceeded the Council's authority in "granting a permit to convert public trust tideland to private use."[82]

Acting under the broad umbrella of the public trust, the court followed several lines of attack and ultimately invalidated the permit. Although vast acres of marshland were threatened, the court focused on the navigable canals and ditches within the marshland and subjected the permit to constitutional scrutiny because of the blockage of these canals. Article XIV, section 4 of the South Carolina Constitution provides that "[a]ll navigable waters shall forever remain public highways free to the citizens of the State . . . [and no] wharf [shall be] erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly."[83] The court determined that the true test of navigability is "whether a stream inherently and by its nature has the *capacity* for valuable floatage, irrespective of the fact of actual use or the extent of such use."[84] The court concluded that since these waterways were regularly used by the general public for boating, they were navigable in fact.

Following traditional public trust principles, the court recognized that "boating, hunting, and fishing [are] legitimate and beneficial public use[s]."[85] Noting that the passageways were used by pleasure boat-

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80. *Id.* at 447, 346 S.E.2d at 717.

81. *Id.* at 446, 346 S.E.2d at 717.

82. *Id.*

83. S.C. CONST. art. XIV, § 4.

84. *South Carolina Coastal Council*, 289 S.C. at 449, 346 S.E.2d at 719 (citing Heyward v. Farmers Mining Co., 42 S.C. 138, 19 S.E. 963 (1894)); *see also* State v. Pacific Guano Co., 22 S.C. 50 (1884) (court repudiated common law doctrine that navigability of a stream is to be determined by the ebb and flow of the tide); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647-48 & n.90 ("Gradually, application of the public trust doctrine has shifted to include navigable waters that do not meet the federal test of navigability for the purposes of state sovereign title, but instead satisfy the lesser state law standard . . . ."); Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 612 (1982) (proposing that a better solution is to apply property law to title disputes and police power principles to regulatory controversies).

85. *South Carolina Coastal Council*, 289 S.C. at 450, 346 S.E.2d at 719.

ers to gain access to the interior of the island, the court stressed the strong protection traditionally afforded to this public trust interest: "there cannot be the least doubt that the public is as much entitled to be protected in its use of [navigable waters] for floating pleasure boats as for any other purpose."[86] For these reasons, the court found the permit could not withstand constitutional attack:

> The use of this waterway by the general public for boating, hunting, and fishing is a legitimate an beneficial public use. It is our view that these waterways not only have the [required] navigable capacity . . ., but they are navigable in fact as evidenced by their use by the general public.[87]

The Council, the court held, did not have the authority to issue a permit allowing complete blockage of navigable waterways, especially where no overriding public interest existed.[88]

The environmental impact of the proposed developments of the marshes concerned the court. The 660 acres of marshland were traversed by approximately nine canals and ditches which were vestiges of those dug by early rice planters. The court noted the ecological value of these ditches and canals which "facilitate[d] the movement of water and various organisms and organic material between the major natural creeks with which they connect[ed] and the marsh itself."[89]

One ostensible purpose of the impoundment was the development of aquaculture. The evidence, however, showed that the impoundment would "only be minimally effective for aquaculture purposes and the benefit to the public tenuous."[90] The primary purpose of the impoundment was a commercial waterfowl venture in which the permittee planned to build ten duck blinds and lease them for $1000.00 per blind per year.[91] These purposes were insufficient to show an overriding public interest justifying destruction of the marshes.

In South Carolina, the public trust doctrine traditionally has been used as a means for the state to reclaim its ownership of tidelands when the owner cannot trace the title to a grant from the state or produce evidence of the grantor's intent to convey to the low water

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86. *Id.* (quoting State *ex rel.* Lyon v. Columbia Water Power Co., 82 S.C. 181, 189, 63 S.E. 884, 888 (1909)).

87. *Id.* (citing Heyward v. Farmers Mining Co., 42 S.C. 138, 19 S.E. 963 (1894)).

88. *Id.* (the court also analyzed the purposes and effects of the permit in light of Council Regulations). *But see* State v. Columbia Water Power Co., 90 S.C. 568, 573-74, 74 S.E. 26, 27-28 (1912) and cases cited therein.

89. *South Carolina Coastal Council*, 289 S.C. at 448, 346 S.E.2d at 718.

90. *Id.* at 450, 346 S.E.2d at 719.

91. *Id.* at 450-51, 346 S.E.2d at 719-20.

mark.[92] South Carolina courts also recognize a strong public trust interest in navigable waterways.[93] The *Coastal* decision expands the doctrine beyond its traditional purview because the court used tenets of the public trust doctrine to prevent the commercial exploitation of public lands by a private party. Interestingly, the court applied public trust principles to prevent the private development of the marshland by using the presence of navigable canals and ditches as a dispositive factor. In doing so, the *Coastal* court arguably accomplished the same result as the *Phillips Petroleum* Court; however, in *Phillips Petroleum* the Court explicitly held that the public trust extends to nonnavigable, tidally-influenced lands.[94]

In *Rice Hope Plantation v. South Carolina Public Service Authority*[95] the court cited the public trust doctrine as a means for state regulation of privately owned lands and waters. The plaintiff corporation in *Rice Hope* alleged that the construction of a dam on a river caused salt water to infiltrate streams and tidelands that ran through its property. While declining to rule on methods that could be used by private owners to acquire title to lands below the high water mark on tidal navigable streams, the court opined that "any such ownership would be . . . subject to the dominant power of the government (State and Federal) to control and regulate navigable waters."[96] The court quoted with approval language from *United States v. Commodore Park*,[97] in which the Supreme Court stated that private title holders of public trust land under navigable waters were subject to the government's paramount regulatory authority:

> "*United States v. Chicago, M., St. P. & P. R. Co.*, set at rest any remaining doubt concerning the dominant power of the government to control and regulate navigable waterways in the interest of commerce, without payment of compensation to one who under state law may hold 'technical' legal title (as between himself and others in the government) to a part of a navigable stream's bed."[98]

Thus, South Carolina courts have recognized a strong public trust in-

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92. *See, e.g.*, State v. South Carolina Phosphate Co., 22 S.C. 593 (1884).

93. *See, e.g.*, Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928).

94. *See supra* text accompanying notes 38-63.

95. 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds*, McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (abolishing doctrine of sovereign immunity).

96. *Id.* at 530, 59 S.E.2d at 145.

97. 324 U.S. 386 (1945).

98. *Rice Hope*, 216 S.C. at 528-29, 59 S.E.2d at 144 (quoting *Commodore Park*, 324 U.S. at 390) (citation omitted)); *see* Early v. South Carolina Pub. Serv. Auth., 228 S.C. 392, 90 S.E.2d 472 (1955); Brief of Appellant at 9, State v. South Carolina Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986) (No. 84-51).

terest in navigable waters and tidelands.

F. Expansion: The Doctrine's Use in Other Jurisdictions

The scope of the public trust doctrine has been expanded to accommodate a broad range of environmental concerns. As a result of *Phillips Petroleum*, the public trust interest in tidelands may be extended to nonnavigable tidal marshes and streams. The *Phillips Petroleum* opinion indicates that the doctrine also can be applied to "navigable fresh-waters and the lands beneath them."[99] Extending the applicability of the doctrine beyond water resources, courts have included wildlife,[100] archaeological relics,[101] endangered species of plants and animals,[102] parklands,[103] natural forests,[104] filled marshlands,[105] and an historic battlefield site[106] within the doctrine's scope. At least one court, however, has refused to apply the doctrine to air.[107] The doctrine is codified by legislation[108] or constitutional amendment[109] in

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99. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988).

100. *See* Wade v. Kramer, 121 Ill. App. 3d 377, 459 N.E.2d 1025 (1984) (state is trustee of wildlife and archaeological relics which it holds in public trust).

101. *See id.*

102. *See id.* at 377, 459 N.E.2d at 1025 (doctrine not violated by damage to wildlife and archaeological remains caused by building highway through county conservation area).

103. Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 263 N.E.2d 11 (1970) (suit to enjoin implementation of plans to construct school and recreational facilities in two parks).

104. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

105. State v. Murrell's Inlet Camp & Marina, Inc., 259 S.C. 404, 192 S.E.2d 199 (1972) (state claimed title to natural salt marshes allegedly filled by the defendant). *But see* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362 (1980) (filled parcels of land are rendered valueless for public trust purposes), *cert. denied*, 449 U.S. 840 (1980).

106. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973).

107. *See* Evans v. City of Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199 (Sup. Ct. 1978) (plaintiffs alleged maintenance of sewage facilities polluted air over city).

108. CONN. GEN. STAT. ANN. §§ 22a-14 to -20 (West 1985 & Supp. 1989); MICH. COMP. LAWS ANN. § 691.1201-.1207 (West 1987); MINN. STAT. ANN. §§ 116 B.01-B.13 (West 1987 & Supp. 1990).

109. *See, e.g.*, LA. CONST. art. IX, § 1; PA. CONST. art. I, § 27. Pennsylvania amended its state constitution to include the public trust doctrine:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.; *see also National Gettysburg Battlefield Tower, Inc.*, 454 Pa. at 209, 311 A.2d at 596 (Jones, C.J., dissenting) (arguing that the amendment "installs the common law public

several states.

The public trust doctrine has become increasingly malleable as a remedy for environmental harms. It has been used as a vehicle to gain standing[110] and shift burdens of proof.[111] Although the doctrine traditionally has been asserted by states, some courts have recognized a general trust duty applicable to the federal government.[112] In *Sierra Club v. Department of the Interior*,[113] the court concluded that a duty was imposed on the National Park Service "to conserve scenery and natural and historic objects and wildlife . . . and to provide for the enjoyment of the same in such manner . . . as will leave them unimpaired for the enjoyment of future generations."[114] Similarly, other courts have recognized that the sovereign right to protect the public interest in preserving wildlife resources allows the United States to maintain an action for damages to its public lands and the natural resources on them.[115]

II. IMPLICATIONS FOR PRIVATE PROPERTY RIGHTS

The re-emergence of the public trust doctrine is a symptom of a fundamental and profound change occurring in the American concept of property ownership: the decline of the distinction between public and private property. Professor Duncan Kennedy argues that the lines of demarcation between public and private societal institutions are blurring and that eventually the distinction will disappear.[116] According to Professor Kennedy, the stages of the decline are already evident. He notes that "the development of intermediate terms means formal

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trust doctrine *as a constitutional right to environmental protection* susceptible to enforcement by an action in equity").

110. *See, e.g.*, Timm v. Portage County Drainage Dist., 145 Wis. 2d 743, 751 n.8, 429 N.W.2d 512, 516 n.8 (Ct. App. 1988) (party suing for purposes of vindicating public trust in navigable waters has standing to assert causes of action recognized by state law).

111. *See* Texas E. Transmission Corp. v. Wildlife Preserves, 48 N.J. 261, 225 A.2d 130 (1966).

112. *See, e.g.*, United States v. 1.58 Acres of Land, 523 F. Supp. 120, 125 (D. Mass. 1981).

113. 398 F. Supp. 284 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (1976).

114. *Id.* at 287 (citations omitted).

115. *See* United States v. Burlington N. R.R., 710 F. Supp. 1286, 1287 (D. Neb. 1989) (court refused summary judgment in action for damages to wildlife destroyed by fire on government land); *accord In re* Matter of Stewart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980); *see also* Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 671 (1st Cir. 1980) (since statutory recovery was possible, court declined to decide whether public trust doctrine permits trustee to sue for damages to public natural resources including trees and animals), *cert. denied*, 450 U.S. 912 (1981).

116. *See* Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

recognition that some situations are . . . neither public nor private—but rather share some characteristics of each pole" and are treated as public for some purposes and private for others.[117]

As examples supporting his theory, Kennedy cites the grain elevators in *Munn v. Illinois*[118] and the restrictive covenants in *Shelley v. Kraemer*.[119] In *Shelley*, the public/private distinction collapsed when "the fourteenth amendment required the states to outlaw any 'private' actor who practiced racial discrimination."[120] Kennedy coined the descriptive terms "continuumization"[121] (meaning that people see most entities not as absolutely one thing or another) and "loopification"[122] (a concept signifying that today it may be impossible to distinguish public from private since it is becoming one loop). He concludes that "one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."[123]

At the boundaries of the public trust doctrine is the evidence of a form of quasi-public, quasi-private property which is the radical new species envisioned by Professor Kennedy. An example of the public trust brought to bear on private property occurs in *Texas Eastern Transmission Corp. v. Wildlife Preserves*.[124] Wildlife Preserves was a private, nonprofit corporation that acquired lands and devoted them to wildlife conservation and preservation. Texas Eastern sought to condemn a right-of-way across 1400 acres of Preserves' land in order to install underground gas transmission pipelines. In its answer, Preserves alleged "that the lands were devoted to a prior public use, i.e. conservation and the preservation of wildlife, and in the circumstances not subject to condemnation for plaintiff's purpose."[125] The private property became so mixed with the public's use that distinctions became difficult to draw.

The court noted that not only the property, but also its owner, was a sort of public/private hybrid that merged as a response to the environmental concerns that are becoming commonplace today, yet were unheard until the latter half of this century:

> Defendant is not a public agency or a public utility; it is a private enterprise carried on by a public-spirited nonprofit organization for

117. *Id.* at 1351.
118. 94 U.S. 113, 126-34 (1876).
119. 334 U.S. 1 (1948).
120. Kennedy, *supra* note 116, at 1352.
121. *Id.*
122. *Id.* at 1354.
123. *Id.* at 1357.
124. 48 N.J. 261, 225 A.2d 130 (1966).
125. *Id.* at 265, 225 A.2d at 133.

> the purpose of preserving our natural wildlife resources.
>
> . . . Defendant's voluntary consecration of its lands as a wildlife preserve, while not giving it the cloak of a public utility, does invest it with a special and unique status. Qualitatively . . . the status might be described as lower than that of a public utility but higher than that of an ordinary owner who puts his land to conventional use.[126]

The unique environmental value of the Preserves' land prompted the court to distinguish the situation from that of an ordinary property owner and to provide ultimately for a more favorable burden of proof for the defendant.[127] The court reasoned that the "devotion of [Wildlife Preserves'] land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking . . . by arbitrary action of a condemnor."[128] This burden of proof reverses the traditional rule that the private owner of condemned property bears the burden of showing the government acted unfairly. The shifting of the burden of proof seems to reflect the court's tacit recognition of the environmental value of the wetlands.[129] Thus, this private property was subsumed under of the umbrella of the public interest.

Another example of a merger of public and private rights occurred with the enactment of the South Carolina Coastal Tidelands Statute.[130] This statute places a moratorium on development of ocean front property accreted by natural forces. The newly accreted land is held in public trust for the people of South Carolina.[131] The statute reverses the common law rule which provided that private owners of oceanfront land may own land up to the high water mark.[132] As a classic example of the public trust doctrine enacted into law, the statute in effect places private lands into the public trust.

The decline of the distinction between public and private property is increasingly evident in environmental law. The expansion of the public interest in natural resources and the environment is apparent in comprehensive environmental legislation, the public trust doctrine, and wetlands and coastal protection. Related fields of law such as historic

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126. *Id.* at 267-68, 225 A.2d at 134.

127. *Id.* at 268, 225 A.2d at 134.

128. *Id.* at 273, 225 A.2d at 137.

129. *See* Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 817 (1979) (concluding that the decision "forecasts a shift in the burden of proof in favor of environmental plaintiffs.").

130. *See* S.C. CODE ANN. § 48-39-120 (Law. Co-op. 1987).

131. *Id.* § 48-39-120(B).

132. *See, e.g.*, State v. Pinckney, 22 S.C. 484 (1885).

preservation, open space zoning, and growth control[133] also illustrate expanding governmental control and regulation that extend into the bounds of private property.[134]

Historically, private property owners were buttressed by nineteenth century laissez faire ideals of ownership and enjoyed unfettered freedom within the domain of their parcels of property. Traditionally sacrosanct property rights, including the right to exclude, were aptly described as the right of the property's "commander 'to look any man in the eye and tell him to go to hell.' "[135] Private ownership also included the right to manage the property and direct the manner in which resources were to be used and exploited.[136]

The development of the law of nuisance marked the beginning of curbs on the rights of owners: the property owner was free to do whatever he wished, so long as neighboring owners were not disturbed. In recent years, legislation enacted in response to the environmental crisis proscribes and abdicates more of these freedoms by prohibiting conduct by which land and natural resources are polluted or contaminated. The concomitant development of common law theories such as nuisance and the public trust doctrine evidence the growing tendency toward judicial intervention in order to remedy and prevent adverse environmental impacts.[137] The result is a "major transformation in which property rights are being fundamentally redefined to the disad-

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133. *See* Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 482 (1983).

134. Several recent decisions, however, reflect an effort by some courts to limit public rights to private property by applying constitutional principles of takings law. *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (Public Trust in Intertidal Land Act which gave public right to use privately owned intertidal land for recreation without compensating owners was unconstitutional taking); Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enters., 95 N.C. App. 38, 381 S.E.2d 810 (1989) (application of public trust doctrine to give public right of access to beach at expense of private property owners would deprive owners of property rights without just compensation); *cf.* First Presbyterian Church v. City Council, 25 Pa. Commw. 154, —, 360 A.2d 257, 263 (1976) (Kramer, J., concurring) ("[L]egislatures and courts are adding a new dimension which may do violence to constitutional private property rights, for now we hold that a private property owner must make his property available without compensation for public view.").

135. M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 108 (1985) (quoting W. LIPPMANN, THE METHOD OF FREEDOM 101-02 (1934)).

136. These and other tenets of classical property law are discussed in Monroe's essay "Ownership" collected in *Making Law Blind*, 168 (1987).

137. *See* Comment, *The Public Trust Totem in Public Land Law: Ineffective—And Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 469-71 (1982) (arguing that the judiciary is not equipped to engage in the balancing processes of public lands decision-making).

vantage of property owners."[138]

Despite these developments which forebode dramatic changes in American property law, it is important to note that the conceptual underpinnings of this transformation in the idea of property ownership are traceable to the early common law and economic development of our society. In the late eighteenth century, agrarian conceptions of property entitled owners to undisturbed enjoyment. The early nineteenth century brought a movement toward dynamic, instrumental, more abstract views of property which emphasized newly paramount ideals of productive use and development.[139] Blackstone's *Commentaries* include the concept of private property in conflict with public demand for property and resources common to all, as well as the notion of the transience of private property ownership:

> Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for a time his own.[140]

These conceptual origins of property and environmental law reflect the protection of "certain things of importance to the entire community from private exploitation by individual owners."[141] Traditional ideas of property rights included some state-enforced restrictions and duties imposed on private property owners.[142] Environmental doctrines, laws, and regulations which curb the private property owner's freedoms are reflections of these principles in their modern adaptions. Thus, courts and legislatures, faced with the twin spectres of environmental contamination and dwindling natural resources, are invoking these historic concepts in response to contemporary demand. Population explosion, industrial growth, and chemical contamination threaten the right to unencumbered property use. The legal system's challenge is to develop environmental doctrines that satisfy societal needs and justify curtailment of the rights of property owners.[143]

Many policies underlying contemporary environmental law are utilitarian. They reflect the realization that the planet is finite and

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138. *Sax*, *supra* note 133, at 481; *see* Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 249 (1973).

139. *See* Horwitz, *supra* note 138, at 249.

140. 2 W. BLACKSTONE, COMMENTARIES *4.

141. *See* Coquillette, *supra* note 129, at 821.

142. *See* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927).

143. *See* Coquillette, *supra* note 129, at 764.

contains finite natural resources;[144] yet the planet must support potentially infinite numbers of human beings for a potentially infinite period of time. Principles of utility look forward to "future effects of acts and rules on the general welfare."[145] Utilitarianism is especially suited to environmental law because the allocation and protection of increasingly scarce resources, including clean air and water, must be viewed in terms of consequences to the aggregate welfare. Commentators envision a future in which "public (nonexclusive) rather than privatized (exclusive) benefits are going to loom much larger in long-term resource planning."[146]

Accordingly, the private landowner, albeit ownership in fee simple, is becoming somewhat of a custodian of land and other natural resources belonging to future public generations. By law, he is charged with the prudent, ecologically sound use of his property.[147] Environmental laws impose harsh penalties on owners of contaminated land. Furthermore, penalties are imposed even though the owner's conduct, for example, the spillage of chemicals on the soil, in recent times and under traditional purview would have been regarded as unquestionably the owner's "right" to do by virtue of his ownership.[148]

From a theoretical standpoint, the resultant trends are indicative of dramatic and previously unimagined changes in the American conceptions of property ownership and the balance between public and private rights. These changes are manifest in the expansion of the public trust doctrine and other environmental remedies:

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144. *See* Ecclesiastes 1:9 ("[T]here is no new thing under the sun." (emphasis omitted)).

145. *See* Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 713 (1989). The author writes:

> Consequential in nature, [the concept of utility] evaluates the ethical content of acts and rules in terms of their aggregate welfare—the extent to which the aggregate or average happiness of all citizens is advanced. Standing in contrast to right-based theories of ethics such as freedom, . . . the principle of utility is thus teleological, looking forward to the future effects of acts and rules on the general welfare as the basis for judging their moral content.

Id.

146. *See* Sax, *supra* note 133, at 495-96 (1983).

147. *See* F. GRAD, *supra* note 1, at 1017 (quoting Berlin, Roseman & Kessler, *Law in Action*, in LAW AND THE ENVIRONMENT 166 (Baldwin ed. 1970) ("The public interest requires that man's environment be utilized in a manner that permits the maximum number of people to obtain benefits of their environment.").

148. The traditional right of property included "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. BLACKSTONE, COMMENTARIES *2; *see also* Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) ("The central idea of the public trust is preventing the destabilizing disappointment of [common property] expectations . . . .").

> [t]he [public trust] doctrine threatens to fuel a developing clash in liberal ideology between furthering individual rights of security and dignity, bound up in notions of private property protection, and supporting environmental protection and resource preservation goals, inevitably dependent on intrusive governmental programs designed to achieve longer-term collectivist goals.[149]

These tensions mirror the larger debate between public and private control of natural resources.[150]

The blurring of traditional boundaries between public and private property occurs in cases in which the fee simple rights of private title holders are compromised to accommodate the public trust. Several courts have held that conveyances to private parties in fee simple may remain subject to public rights to the property conveyed.[151] Citing competing demands for scarce resources, courts have imposed public rights in private property, thus creating hybrid forms of ownership.[152]

For example, in *Boston Waterfront Development Corp. v. Commonwealth*[153] the issue concerned the fee simple title to land covered by the seaward end of a wharf constructed over filled land. The wharf was partly covered by the corner of a granite building renovated into shops, offices, restaurants, and condominiums. The courts held that the title was subject to the public trust and implied a condition subsequent that the land be used for the public purpose for which it was granted.[154] The court noted that the import of its holding was that "the land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development."[155] Recognizing

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149. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986); *see* Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196 (1980).

150. *See* Note, *supra* note 63, at 571.

151. *E.g.*, San Diego County Archaeological Soc'y, Inc. v. Compadres, 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (1978) (holding that lagoon conveyed was subject to public trust easement claimed by city and state), *rev'd on other grounds sub nom.* Summa Corp. v. California, 466 U.S. 198 (1984) (state's claim to such a servitude must have been presented in the federal patent proceeding in order to survive the issue of a fee patent); *see* Boston Elevated R.R. v. Commonwealth, 310 Mass. 528, 39 N.E.2d 87 (1942).

152. *See* United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123 (D. Mass. 1981) ("Historically, no developed western civilization has recognized absolute rights of private ownership in [public trust] land as a means of allocating this scarce and precious resource among the competing public demands.").

153. 378 Mass. 629, 393 N.E.2d 356 (1979).

154. *See id.* at 649, 393 N.E.2d at 367.

155. *Id.*

the incongruity of the public trust doctrine applied to a fee simple grant, the court stated that "this [public trust] concept is difficult to describe in language in complete harmony with the language of the law ordinarily applied to privately owned property."[156]

The public trust doctrine and the recognition of public rights in private natural resources also illustrates changing conceptions of sovereignty and the role of the sovereign in the allocation of these resources. The modern trend includes an erosion of traditional concepts of private property rights and the substitution of new notions of sovereign power over these resources.[157] Professor Sax views governmental intervention in resource allocation as a necessary response to the misallocation of land and resources occurring as a result of private ownership rights.[158] The trust doctrine provides a mechanism for judicial overview of state resource management decisions in which the public interest of the majority is frequently overshadowed by a vocal, politically powerful minority consisting of developers, corporations, and others who benefit from lucrative private exploitation and development of these resources.[159]

III. CONCLUSION

The fortification of the public trust doctrine is indicative of the larger trend of increasing environmental controls and protective legislation. The proscription of some private property rights and a corresponding increase in the public right to unspoiled natural resources is inevitable. Some commentators and courts regard this trend with uneasiness and decry the negative portents of the loss of private rights. However, the environmental problems facing the American society are of such magnitude as to require correspondingly dramatic and far-reaching legislative and judicial remedial intervention. When balanced according to a conventional cost/benefit analysis, the abdication of some private property rights may be a small price to pay for the rescue of our imperiled environment.

Johanna Searle

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156. *Id.*; *see also* Boston Elevated R.R. v. Commonwealth, 310 Mass. 528, 39 N.E.2d 87 (1942) (irrevocable grant of public land to railroad company can nevertheless be revoked if company fails to construct railway within the designated time period).

157. *See* Lazarus, *supra* note 149, at 633.

158. Sax, *supra* note 133, at 488. Professor Sax notes that as a result of this trend, "what was long viewed as exceptional (government intervention to allocate correctly) is becoming commonplace. This change cannot help but impose enormous pressure upon our conception of the role that private ownership in land should play." *Id.*

159. Note, *The Public Trust and the Constitution: Routes to Judicial Overview of Resources Management Decisions in Virginia*, 75 VA. L. REV. 895, 916 (1989).